STATE OF MICHIGAN

COURT OF APPEALS

DOROTHY MCMAHAN,

Plaintiff-Appellant,

v

MARVIN AUKER and CAROL AUKER,

Defendants-Appellees.

UNPUBLISHED
December 2, 2003

No. 241123
Genesee Circuit Court
LC No. 00-067202-NO

Before: Murray, P.J., and Gage and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's orders dismissing the case and granting defendants' motions for summary disposition. We affirm in part, reverse in part, and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff rented space in the home of defendants. Her belongings were stored in the basement and the attic. The attic was located above the garage, and was accessible through a trap door in the ceiling. A built-in pull-down stairway allowed access through the trap door. Defendants had placed sheets of plywood over the support beams in the attic to create a makeshift floor. The plywood did not cover the entire attic area. Insulation had been placed between the support beams in the attic.

Defendants requested that plaintiff repack her belongings in boxes of uniform size. Plaintiff went to the attic to retrieve the boxes and some of her belongings. She did not carry a flashlight or turn on the electric light in the attic; however, the light coming through the trap door was sufficient to illuminate the attic. Plaintiff noted the presence of plywood in the attic. As she walked toward the packing boxes she stepped off the plywood flooring and into the insulation between the support beams. She fell through the ceiling and down into the room below, sustaining injuries.

Plaintiff filed a three-count complaint alleging that: she was on the premises as a business invitee and that defendants negligently failed to maintain the premises in a reasonably safe condition and to warn of the unsafe condition; the hazardous condition in the attic constituted a nuisance; and by failing to maintain the premises in reasonable repair defendants breached the implied warranty of habitability set forth in MCL 554.139.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). They alleged that the condition of the attic, i.e., the fact that the plywood walking surface did not cover the entire attic, was open and obvious. Regarding plaintiff's allegation that the condition of the attic constituted a nuisance, defendants argued that the claim was actually one for negligence, and therefore failed to state a claim on which relief could be granted. Regarding plaintiff's claim of breach of implied warranty of habitability, defendants argued that the factual allegations were identical to those alleging premises liability, and therefore failed to state a claim on which relief could be granted.

Initially the trial court granted defendants' motion for summary disposition of plaintiff's claims of premises liability and nuisance, but denied the motion as to plaintiff's claim of breach of implied warranty of habitability. Subsequently the trial court, relying on *Woodbury v Bruckner (On Remand)*, 248 Mich App 684, 696; 650 NW2d 343 (2001), remanded 467 Mich 921; 658 NW2d 482 (2002), found that defendants could raise the open and obvious danger doctrine in response to plaintiff's claim of breach of the implied warranty of habitability and granted summary disposition of that claim.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach of duty proximately caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. A possessor of land may be held liable for injuries resulting from negligent maintenance of the land. The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it for himself. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995).

The open and obvious danger doctrine attacks the duty element that a plaintiff must establish in a prima facie negligence case. *Id*. at 612. Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). However, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions to protect an invitee from that risk. If such special aspects are lacking, the open and obvious condition is not unreasonably dangerous. *Lugo v Ameritech Corp Inc*, 464 Mich 512, 517-519; 629 NW2d 384 (2001).

Plaintiff argues that the trial court erred by granting defendants' motion for summary disposition of her claim of premises liability. We disagree and affirm the trial court's grant of summary disposition of this claim. In her deposition plaintiff admitted that the distinction between the plywood on the attic floor and the exposed support beams was clearly visible in photographs, and that the illumination in the attic was sufficient to allow her to see the contents of the attic. Plaintiff also admitted that she was not watching where she was walking as she

approached the boxes. The fact that plaintiff claimed she did not see the exposed support beams is irrelevant. *Novotney, supra* at 477. While an average person of ordinary intelligence is not required to closely inspect every inch of a surface upon which he or she might step, public policy requires a person to take reasonable care for his or her own safety. *Bertrand, supra* at 616-617. It is reasonable to conclude that plaintiff would not have been injured if she had been watching the area in which she was walking. *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 497; 595 NW2d 152 (1999).

The affidavit from plaintiff's liability expert did not create a question of fact in light of plaintiff's admission that although the lighting conditions in the attic allowed her to see the surface on which she was walking, she simply did not pay attention to the surface on which she stepped. *Bertrand, supra*. Plaintiff did not come forward with sufficient evidence to create an issue of fact as to whether an average person with ordinary intelligence would have discovered the condition upon casual inspection. *Novotney, supra* at 474-475. The trial court did not err in concluding that the flooring in the attic constituted an open and obvious danger.

Plaintiff's argument that even if the condition was open and obvious it still presented an unreasonable risk of harm is without merit. Plaintiff failed to demonstrate the existence of any special aspects that made the condition unreasonably dangerous in spite of its open and obvious nature. *Lugo, supra*. Nothing indicated that plaintiff would have been unable to avoid the danger had she paid attention to her surroundings. *Joyce v Rubin*, 249 Mich App 231, 240-242; 642 NW2d 360 (2002). Had plaintiff simply watched her step, any risk of harm would have been obviated. *Spagnuolo v Rudds No 2, Inc*, 221 Mich App 358, 360; 561 NW2d 500 (1997). Summary disposition of plaintiff's claim of premises liability was proper.

An actor is subject to liability for a private nuisance for a nontrespassory invasion of another's interest in the private use and enjoyment of land if: (1) the other has property rights and privileges attached to the use or enjoyment interfered with; (2) the invasion resulted in significant harm; (3) the actor's conduct was the legal cause of the invasion; and (4) the invasion was either intentional and unreasonable or intentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultra hazardous conduct. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995).

Plaintiff argues that the trial court erred by granting defendants' motion for summary disposition of her claim of nuisance. She contends that a claim of nuisance can be predicated on the existence and maintenance of a dangerous condition on the land. *Rosario v City of Lansing*, 403 Mich 124, 132; 268 NW2d 230 (1978). We disagree and affirm the trial court's grant of summary disposition of this claim. Plaintiff's reliance on *Rosario, supra*, is misplaced. The issue considered in that case was the nuisance exception to governmental immunity. Moreover, the broad reading given to that exception in *Rosario, supra*, was rejected in *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139; 422 NW2d 205 (1988), overruled on other grounds in *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002). Allegations that assert a failure to act sound in negligence rather than in nuisance. *Fuga v Comerica Bank-Detroit*, 202 Mich App 380, 383; 509 NW2d 778 (1993). In her complaint plaintiff alleged that defendants created and maintained a nuisance by failing to act, i.e., by failing to place plywood over the entire attic. The substance of plaintiff's allegations in her claim of nuisance were identical to her allegations in her claim of premises liability. The trial court correctly dismissed plaintiff's claim of nuisance on the ground that it actually sounded in negligence. *Id*.

Finally, we conclude that the trial court erred in dismissing plaintiff's claim of breach of the implied warranty of habitability, MCL 554.139, on the ground that the claim was obviated by the open and obvious danger doctrine. (sentence moved to highlighted section below) In *Woodbury*, *supra*, another panel of this Court held that a lessor's breach of the statutory duty to repair the premises could result in tort liability, and that the open and obvious danger doctrine could be raised in response to an allegation of liability. *Woodbury*, *supra* at 696. However, in remanding the case to this Court for a determination whether the defendants violated the reasonable repair requirement of MCL 554.139(1)(b),[1] our Supreme Court specifically stated that the open and obvious doctrine could not be relied upon to avoid a specific statutory duty. *Woodbury v Bruckner*, 467 Mich 922; 658 NW2d 482 (2002), amended __ Mich __; 666 NW2d 665 (2003); see also *Jones v Enertel, Inc*, 467 Mich 266, 270; 650 NW2d 334 (2002). We reverse the trial court's grant of summary disposition of this claim and remand this matter to the trial court for further proceedings.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Hilda R. Gage
/s/ Kirsten Frank Kelly

[1] This Court remanded the matter to the trial court for further proceedings, and retained jurisdiction.